



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 103 OF 2010**

**HUSSEIN DAIRY LIMITED.....APPELLANT**

**VERSUS**

**LINET KERUBO MACHOGU.....RESPONDENT**

*(An appeal from the judgment and decree of Hon. M.N.GICHERU (Chief Magistrate) dated and delivered on the 6<sup>th</sup> day of May, 2010 in the Original KISII CMCC No. 538 of 2007.)*

**JUDGMENT**

1. Through an amended plaint dated 23<sup>rd</sup> November 2007, the respondent herein, LINET KERUBO MACHOGU, who was the plaintiff before the subordinate court in Kisii SPMCC 538 of 2007, sued the appellant herein and sought the following orders:

- a) **General damages**
- b) **Special damages**
- c) **Future medical expenses**
- d) **Costs**
- e) **Interest**

2. The respondent's case was that on 20<sup>th</sup> August, 2007, she was a lawful fare paying passenger in motor vehicle Reg. No. KAN 464 D travelling along Kisii-Nyamira Road when at Daraja Moja an accident occurred in which the appellants motor vehicle Reg. No. KAX 308Z Trailer Reg. No. ZC0032 veered off its lane and collided with motor vehicle Reg. No. KAX 308Z, in which the respondent was a passenger. As a result of the said collision, the respondent stated that she sustained the following injuries:

- i) **Head injuries**
- ii) **Cerebral concussion**
- iii) **Chest contusion**
- iv) **Crush injury on both feet**

**v)2/3 amputation of both feet.**

3. The appellant defended the suit and denied that he was not liable for the said accident.
4. The appellant attributed contributory negligence to the driver of motor vehicle Reg. No. KAN 464D in which the respondent was a passenger.
5. At the conclusion of the trial before the lower court, the trial magistrate found that the appellant was 100% to blame for the accident and, by extension, the respondent's injuries and awarded the respondent Kshs. 1,400,000/= general damages together with costs and interest.
6. It is the said judgment of the trial court that has precipitated the instant appeal by the respondent in which it has set out the following grounds of appeal:-

**1. The Learned Trial Magistrate erred in law when he decided the case against the weight of evidence led at the trial and in finding that the Appellant was 100% liable for the occurrence of the accident on the basis of the plaintiff's allegation that the appellant's trailer had hit the vehicle in which the plaintiff had been travelling when it swerved, which alleged act of negligence had neither been pleaded nor proved at the trial.**

**2. The Learned Trial Magistrate erred in law when he failed in his duty as the trial court to evaluate the evidence, consider the pleadings and to make his own findings in his judgment from the evidence led at the trial and to note the material discrepancies and departure in the pleadings filed by the Respondent led at the trial.**

**3. The Learned Trial Magistrate erred in fact and in law in making an award of Kshs. 1,400,000/= as general damages for the injuries which the respondent had suffered, which amount is inordinately high and manifestly excessive in the circumstances for the injuries allegedly suffered by the Respondent at the accident and constitute an erroneous estimate of the alleged damage suffered.**

**4. The Learned Trial Magistrate erred in fact and in law when he awarded to the Respondent Kshs. 13,500 as special damages without proof and or basis at all and which sum had not been properly claimed in the suit before him.**

**5. The Learned Trial Magistrate erred in law and in fact when he erroneously and thereby used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the pleadings and the submissions urged on behalf of the Appellant before him and to take into account the fact that comparable injuries should always attract comparable awards.**

**6. The Learned Trial Magistrate erred in law and in fact when in his judgment he relied on documentary evidence and exhibits which were illegally produced at the trial by the Respondent herself without the makers thereof being called to produce them contrary to the provisions of the Evidence Act.**

**7. The Learned Trial Magistrate erred in fact and in law when he failed to apportion liability for the occurrence of the said accident on half ratio basis between the two motor vehicle in the circumstances and in failing to so do he grossly erred.**

7. When the matter came up for directions on 9<sup>th</sup> July 2014, parties agreed to canvass the appeal by way of written submissions.

**Appellant's submissions**

8. The appellant submitted that the respondent did not prove negligence against it to the required

standards. The appellant cited the cases of **Mary Muthoni Kirehu vs Josiah Mucheru & Another Nairobi HCCC No. 845 of 1996**, **Margaret Wanjiru vs S. Karanja & Another Nakuru HCCC 186 of 2002** and **Ndiritu vs Raploi (2005) IEAR 334** in which the plaintiff's claims were dismissed for lack of sufficient evidence to prove negligence.

9. On quantum, the appellant submitted that the pleadings were vague on the nature of injuries that the respondent had sustained in the said accident and a medical report was not produced to confirm the respondent's injuries. It was the appellant's case that the award of Kshs. 1.4 million was manifestly excessive under the circumstances. The appellant contended that an award of Kshs. 700,000/= would have been more appropriate and adequate compensation to the respondent.

### **Respondent's submissions**

10. The respondent submitted that the trial court was justified in holding that the appellant was wholly to blame the accident. On quantum the respondent argued that the injuries she sustained in the said accident were serious and were proved through the exhibits that were produced during the hearing, to wit, initial treatment notes, p3 form and a medical examination report by Dr. Ajuoga.

11. It was the respondent's case that she suffered very severe injuries and urged this court to consider enhancing the trial courts award.

### **Evidence**

12. As a first appellate court, I am now tasked with the responsibility of re-evaluating and re-analyzing the evidence tendered before the trial court with a view to arriving at my own independent findings. See **Selle vs associated Motor Boat Co. Ltd [1968] EA 123**.

### **Respondent's case**

13. The respondent's testimony was that on 30<sup>th</sup> August 2007 she was travelling in motor vehicle Reg. No. KAN 464D from Kisii to Nyamira when at Daraja Moja, a trailer Reg. No. KAX 308Z, which was swaying on the road, caused an accident. She sustained injuries in the said accident and was admitted at Kisii General Hospital for 3 weeks and thereafter to Hema Hospital where she remained until 12<sup>th</sup> May 2008. The respondent blamed the appellant's driver for the accident. She produced the police abstract and receipts in support of her treatment expenses. She stated that she sustained injuries on the head, chest, and fracture on both legs leading to amputation. On being cross-examined by Mr. Ochoki, the respondent stated that motor vehicle Reg. No. KAX 308Z veered off its lane.

14. PW1 was Dr. P. M. Ajuoga, a consultant surgeon who examined the respondent, prepared a medical report and filled her p3 form which he produced as exhibits. He confirmed that the respondent sustained head injuries to wit, cerebral concussion, chest contusion and crush injury on both feet leading to amputation.

15. PW2 was Dr. Cheruiyot Kipn'geno. He testified that he treated the respondent at Kisii Level 5 Hospital and that she sustained injuries that necessitated the amputation of the distal two-thirds of her foot bilaterally. He produced the respondent's discharge summary as Pexhibit 4.

### **Appellant's case**

16. The appellant closed its case without tendering any evidence before the trial court.

### **Analysis and Determination**

17. I have carefully considered the contents of the record of appeal, the parties respective submissions and the authorities cited. I note that the issues that arise in this appeal and that require my determination are as follows:

**a)Whether the respondent sustained injuries in the accident that took place on 30<sup>th</sup> August 2007.**

**b)Whether the respondent proved that the appellant was liable for her said injuries.**

**c)Whether the award of damages was excessive.**

18. On the first issue, I am satisfied that the respondent tendered sufficient oral and documentary evidence to prove that she sustained injuries in the said accident. The respondent called PW1 and PW2 who were both doctors and who confirmed that they examined and treated the respondent for the following injuries.

**a)Head injuries.**

**b)Cerebral concussion**

**c)Chest contusion**

**d)Crush injury on both feet**

**e)2/3 amputation of both feet.**

19. I am therefore satisfied that the respondent proved that she suffered the above injuries on a balance of probabilities.

### **Liability**

20. On liability, the respondent's testimony was that the appellant's vehicle was swaying on the road and that it veered off its lane and collided with motor vehicle Reg. No. KAN 464D wherein the respondent was a passenger thereby causing the accident in question. The testimony of the appellant on the manner in which the accident took place was not challenged or controverted by the appellant who did not call any evidence during the trial. It is therefore my finding that the respondent proved, on a balance of probabilities, that the appellant was liable for the said accident and by extension, to her injuries. I uphold the trial court's finding that the appellant was wholly to blame for the accident. My finding gets support from the Court of Appeal's decision in **Kenya Bus Services vs Dina Kawira Humphrey, CA 295/2000 (unreported)** in which the court observed:

***“Buses, when properly maintained, properly serviced and properly driven, do not just run over bridges and plunge into rivers without explanation.”***

21. In the instant case, the respondent testified as follows:

**“The accident was caused by Motor Vehicle Registration No. KAX 308Z trailer. The trailer was swaying on the road. I blame it for the accident.”**

22. On cross-examination, the respondent stated:

**“I boarded Motor Vehicle Reg. No. KAN 464D, its owner drove on the left lane. No, the vehicle did not veer off its lane. The trailer is the one that veered off the road.”**

23. The cited case of **Kenya Bus Services Ltd vs Dina Kawira Humphrey (supra)** is therefore applicable in this case. The appellant did not explain why his motor vehicle veered off its lane and crashed into an on-coming motor vehicle.

24. In the case of **Embu Public Road Services Ltd vs Riimi (1968) EA 22** it was held:

***".....Where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence....."***

25. As I have already stated in this judgment, the appellant did not tender any evidence in court to counter the respondent's testimony that the appellant's driver was negligent in the manner in which he drove, managed or controlled the suit motor vehicle thereby allowing it to veer off its lane and ram into an oncoming motor vehicle. Section 107 of the evidence Act stipulates as follows:

26. It is my finding that the respondent discharged the burden of proof placed upon her to prove her case on a balance of probabilities and upon discharging this burden, the same shifted to the appellant to show that there was another cause of the accident other than the negligence of its driver.

27. In the instant case, the statement of defence filed by the appellant in the lower court attributed the accident to the negligence of the owner of motor vehicle Reg. No. KAN 464N. The appellant did not however call any evidence to support this claim of negligence and it therefore remained just that, a mere allegation without proof.

28. The appellant did not tender any evidence to show how the owner of M/V Reg. No. KAN 464D contributed to the accident. The respondent's version on how the accident happened has not been contradicted by any other evidence.

29. The standard to be applied on a prudent driver was set in the case of **Embu Public Road Services vs Riimi (supra)** in which it was held that in order to escape liability, the driver has to show that:

***a) There was a probable cause of the accident.***

***b) The explanation should be consistent with absence of negligence.***

***c) It has to be shown that although perfect action is not expected of the driver, nonetheless he has to show that the emergency was so sudden that he could not have taken any amount of corrective measure expected of a competent driver.***

30. I find that the appellant did not meet the threshold set in the above case so as to entitle him to avoid liability. Consequently I find that the trial court was justified in holding that the appellant was 100% liable for the accident.

### **Quantum**

31. The appellant contended that the award of Kshs. 1,400,000/= general damages made to the respondent was excessive and proposed that an award of Kshs. 700,000/= could have been adequate compensation for the respondent's injuries.

32. The principles for assessment of damages were set out by the Court of Appeal for East Africa, and subsequently adopted by our Court of Appeal in the following cases:

**1) Kanga vs Manyoka [1961] EA 705, 709, 7013.**

**2) Lukenya Ranching and Farming Co-op. Society Ltd vs Kavoloto [1979] EA 414, 418, 419.**

**3) Kemfro Africa t/a Meru Express & Anor. vs A.M.Lubia & Anor [1982-88] I KAR 727.**

**4) C.A. No.66 of 1982 Zablon Mangu vs Morris W. Musila (unreported)**

33. From the above authorities, Appellate Court will interfere with the exercise of discretion by the trial

court when assessing damages if the trial court;

*a) Took into account an irrelevant fact or,*

*b) Left out of account a relevant fact or,*

*c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

34. I am further guided by the principles laid down in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held as follows:-

***“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)”***

35. Going by the above dictum, find that the trial magistrate’s exercise of discretion was in tandem with the principles stated hereinabove and was therefore exercised judicially. The trial magistrate based his assessment on damages on the medical evidence adduced in respect to the respondent’s injuries which were as follows:

**a) Head injuries.**

**b) Cerebral concussion**

**c) Chest contusion**

**d) Crush injury on both feet**

**e) 2/3 amputation of both feet.**

36. The trial court had the following to say regarding the respondent's injuries and the authorities cited by the parties:

**" I find the authority of Peter Mativo Mwanja vs Michael Wambua Mwaniki & Another Msa HCCC 86/91 relevant in this case. This is the case cited by the Plaintiff's counsel. The only difference between the injuries is the amputation in Mativo's case was below the knee and involved the left leg only. In this case, it involved both feet and only 2/3 of each foot was amputated.**

**Considering that the award in Mativo's case was made in 1993 which is about 17 years ago and in the meantime inflation in the Kenyan economy has been runaway, the plaintiff is entitled to a much higher award. The fact that her injuries involved two limbs and not one like in the Mativo case makes the injuries in this case to be cumulatively more severe."**

37. The above extract of the trial court's judgment shows that the trial magistrate, in arriving at its award, took into account the severity of injuries suffered by the respondent, the judicial authorities cited by both parties and the inflationary trends on the Kenyan shilling. I have, on re-evaluating the evidence tendered before the lower court noted that the medical report prepared by Dr. Omenya and produced by the appellant as D-exhibit1 showed the respondents injuries as follows:

- **Loss of memory**
- **Loss of both foot**

- **Chest injuries**
- **Fracture of 2 ribs**
- **Dislocation of the right hip joint**
- **Bruises on scapular region.**

38. Dr. Omenya concluded that the respondent had suffered serious traumatic injuries which had resulted in her permanent disability.

39. It is therefore my finding that the award of Kshs. 1,400,000/= general damages made to the respondent was justified, commensurate with the injuries sustained by the respondent in the accident and in line with the principles that the courts have over the time adopted in assessment of damages as I have enumerated hereinabove in this judgment. I find no reason to interfere with the award made by the trial court for general damages.

40. In a nutshell, I find that the instant appeal lacks merit and the order that commends itself to me is to dismiss the said appeal with costs to the respondent.

**Dated, signed and delivered in open court this 6<sup>th</sup> day of December, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Shilwatso for the Appellant

Mr. Mogire for the Respondent

Omwoyo court clerk